

No. 64

UNITED STATES

WILLIAM V. KELLY

ON APPEAL FROM THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Plaintiffs in the American
American Civil Liberties Union
and
American Civil Liberties Union
Of The National Capital Area

Re: Case No.

104-387

Plaintiffs in the

136-387

Plaintiffs in the

Of Counsel:

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September 10, 1964

Supreme Court of the United States

OCTOBER TERM, 1970

No. 84

UNITED STATES,

Appellant.

v.

MILAN VUITCH,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICI CURIAE

American Civil Liberties Union

and

American Civil Liberties Union Fund
Of The National Capital Area

INTEREST OF AMICI CURIAE

The parties have consented to the filing of this amicus curiae brief. Copies of their letters of consent are being submitted to the Clerk with the brief.

The interest of the American Civil Liberties Union and the American Civil Liberties Union Fund of the National Capital Area stems from their work as civil liberties organizations. It is the view of the ACLU that the penumbra of constitutionally protected, non-enumerated rights require that every woman, as a part of her right to the enjoyment of life, liberty and privacy, should be free to determine

when and whether to bear children. Since the District of Columbia anti-abortion statute abridges these rights without a compelling state interest, Amici believe it to be unconstitutional.

In its brief below, the ACLU argued the merits of the constitutional issues raised in this case. Since those arguments will be adequately presented to this Court by the appellee, the ACLU has chosen not to burden the Court unnecessarily with its own statement of those legal arguments. In this regard we support the position of the appellee on the merits.

However, in its letter to counsel for the parties on June 29, 1970, this Court questioned whether it should accept jurisdiction. The ACLU believes that it is imperative that this Court render a decision on the merits of this case as soon as possible. It is hoped that the arguments here presented may be of aid to the Court in its consideration of the above question.

ARGUMENT

The Court has asked if it should, ". . . as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U.S.C. Sec. 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?" Amici suggest that there are factors other than the scope of applicability of the statute which dictate that the Court should entertain jurisdiction.

The Government has ably demonstrated for this Court the procedural subtleties and consequences of the overlap of D.C. Code Sec. 23-105 and the Criminal Appeals Act, 18 U.S.C. Sec. 3731. See Brief for the United States, pp. 10-22. The ACLU agrees with the Government that once a direct appeal is properly filed in this Court under Section 3731 of the Criminal Appeals Act, this Court *must* accept jurisdiction over that appeal and therefore lacks the discretionary power to dismiss or transfer the appeal. Since the

decision below was based upon the invalidity of D.C. Code Sec. 22-201, this Court has jurisdiction in the instant case and is the proper appeal forum.

I. THE IMPORTANCE OF THE ISSUES PRESENTED WARRANTS ACCEPTANCE OF JURISDICTION BY THIS COURT

Should this Court reject the concept of mandatory jurisdiction under Section 3731, it should exercise its discretion and accept jurisdiction.¹ Whatever merit there may be to a general policy of awaiting an initial decision by the U.S. Court of Appeals for the District of Columbia Circuit is here more than outweighed by the urgency and magnitude of the constitutional issues involved, and the direct impact which a decision by this Court on the merits will have upon the statutes in most states.

A. A Decision on the Merits Herein Will Affect Similar Statutes in Most Other States

Although the application of the statute is limited to the District of Columbia, a decision by this Court will, of course, have broader consequences. Of the fifty states in the nation, plus the District of Columbia and Puerto Rico, thirty-four have statutes restricting abortions which use language which the court below held to be constitutionally vague.² At least ten other states have modified their anti-

¹This Court, upon accepting jurisdiction, is not limited to review of the vagueness issue, but may consider the other significant issues raised below which challenged the validity of D.C. Code Sec. 22-201. See *United States v. Harris*, 347 U.S. 612; *United States v. Kahriger*, 345 U.S. 22; *United States v. C.I.O.*, 335 U.S. 106; and *United States v. Classic*, 313 U.S. 299; in all of which, on appeal pursuant to 18 U.S.C. Sec. 3731, the Court considered issues raised before the District Court even though those issues had not been ruled upon below.

²See *Ala. Code tit. 14 § 9* (1958) ("... unless the same is necessary to preserve her life or health"); *Ariz. Rev. Stat. Ann. § 13-211* (1956) (" . . . unless it is necessary to save her life"); *Conn. Gen. Stat. Ann. § 53-29* (1960) (" . . . unless the same is necessary

abortion statutes, eliminating "necessary to preserve" phraseology, but nonetheless retaining restrictions which permit to preserve her life or that of her unborn child"); *Fla. Stat. Ann.* § 782.10 (" . . . unless the same shall have been necessary to preserve the life of the mother"); *Idaho Code Ann.* tit. 18 § 601 (" . . . necessary to preserve her life"); *Ill. Ann. Stat.* Ch. 38, § 23-1 (" . . . necessary for the preservation of the woman's life."); *Ind. Ann. Stat.* § 10-105 (" . . . necessary to preserve her life"); *Iowa Code Ann.* § 701.1 (" . . . necessary to save her life"); *Ky. Rev. Stat. Ann.* § 436.020 (1963) (" . . . necessary to preserve her life"); *La. Rev. Stat.* § 14:87 (1950) (" . . . unless done for the relief of a woman whose life appears in peril"); *Me. Rev. Stat. Ann.* tit. 17 § 51 (" . . . necessary for the preservation of the mother's life"); *Mass. Gen. Laws Ann.* Ch. 272 § 19 (prohibits unlawful abortions, interpreted by court to allow abortions by a surgeon if, " . . . necessary for the preservation of the life or health of the woman."); *Kudish v. Bd. of Registration*, 248 N.E.2d 264 (1969)); *Mich. Stat. Ann.* § 28.204 (" . . . necessary to preserve the life of such woman"); *Minn. Stat. Ann.* § 617.18 (" . . . unless the same is necessary to preserve her life or that of the child with which she is pregnant"); *Miss. Code Ann.* § 2223 (" . . . necessary for the preservation of the mother's life"); *Mo. Rev. Stat.* § 559:100 (" . . . unless the same is necessary to preserve her life or that of an unborn child"); *Mont. Rev. Codes Ann.* § 94-401 (" . . . necessary to preserve her life"); *Neb. Rev. Stat.* § 28-405 (" . . . necessary to preserve the life of such woman"); *Nev. Rev. Stat.* Ch. 201.120 (" . . . necessary to preserve her life or that of the child with which she is pregnant"); *N.H. Rev. Stat. Ann.* § 585.13 (" . . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman"); *N.J. Stat. Ann.* § 2A:87-1 (prohibits abortions when done maliciously or without lawful justification; lawful justification has been interpreted as perhaps being limited to the preservation of the mother's life. *State v. Moretti*, 393 U.S. 952 (1968)); *N.D. Cent. Code Ann.* § 12-25-01 (" . . . necessary to preserve her life"); *Ohio Rev. Code Ann.* § 2901.16 (necessary to preserve her life"); *Okl. Stat.* tit. 21 § 861 (" . . . necessary . . . to preserve her life"); *P.R. Laws Ann.* tit. 33 § 1053 (" . . . necessary to preserve her life"); *R.I. Gen. Laws Ann.* § 11-3-1 (1956) (" . . . necessary to preserve her life"); *S.D. Com. Laws Ann.* § 22-17-1 (" . . . necessary to preserve her life"); *Tenn. Code Ann.* § 39-301 (1955) (" . . . to preserve the life of the mother"); *Tex. Pen. Code Ann.* arts. 1191-1196 (" . . . for the purpose of saving the life of the mother"); *Utah Code Ann.* § 76-2-1 (" . . . necessary to preserve her life"); *Vt. Stat. Ann.* tit. 13 § 101 (1959) (" . . . necessary to preserve her life"); *Wash. Rev. Code* § 9.02.010 (" . . .

doctors to perform abortions only in certain specified situations.³

A decision on the merits in this case will affect most if not all of these statutes,⁴ and will have a direct impact upon a critical social and health problem that is national in scope.

That there exists today a rising nationwide concern over the status of anti-abortion laws need not be documented for this Court. The press regularly carries stories of the introduction in state legislatures of bills to reform or repeal

necessary to preserve her life or that of the child whereof she is pregnant"); *W. Va. Code* § 61-2-8 (" . . . with the intention of saving the life of such woman or child"); *Wis. Stat. Ann.* § 940.04 (" . . . necessary . . . to save the life of the mother"); *Wyo. Stat. Ann.* § 6-77 (" . . . necessary to preserve her life").

³See *Ark. Stat. Ann.* § 41-304 (1969 Pocket supp. to 1947); *Cal. Health & Safety Code* § 25951; *Colo. Rev. Stat. Ann.* § 40-2-50; *Ga. Code Ann.* § 26-1202; (1969 Rev.); *Kan Gen. Stat. Ann.* § 21-3407; *Md. Ann. Code* art. 43 § 149E; *N.M. Stat. Ann.* § 40A-5-1 (1953); *N.C. Gen. Stat.* § 14-45.1; *Ore. Laws* Ch. 684 § 3 (1969); *Va. Code* §§ 18.1-62.1 (1963).

⁴Several suits challenging the constitutionality of anti-abortion statutes on grounds similar, if not identical, to those raised in the instant case are currently at various stages of litigation in the federal courts. *McCann v. Babbitt*, 310 F.Supp. 293 (E.D. Wisc., 1970) (declared Wisconsin anti-abortion statute unconstitutional), *appeal docketed*, No. 297, October Term 1970, 38 U.S.L.W. 2498 (June 20, 1970); *Doe v. Bolton*, Civ. Case 13676 (N.D. Ga., July 27, 1970) (declared Georgia anti-abortion statute unconstitutional in part); *Crossen v. Breckenridge*, Civ. No. 2143 (E.D. Ky., June 15, 1970) (suit dismissed), appeal pending before the Sixth Circuit; *Roe v. Wade*, Civ. Action 3-3690B (N.D. Texas, June 17, 1970) (declared Texas anti-abortion statute unconstitutional); *Planned Parenthood v. Nelson*, Civil 70-334, (D.C. Ariz.) (case pending); *Benson v. Johnson*, Civ. No. 70-226 (D.C. Ore.) (case pending). A decision on the merits in this case would benefit sound judicial administration by eliminating the developing multiplicity of suits in this area.

these laws, and of positions being taken by professional and religious organizations concerned with this increasingly crucial social issue. Until this Court acts on the merits of this case, or one like it, there will remain over the constitutional issues here involved a cloud that will interfere with effective legislative reform and with the very personal rights of thousands of persons, mostly women, who are directly affected by anti-abortion statutes and practices.

These anti-abortion laws, which are so regularly being violated, had their genesis in the nineteenth century and represented an application of then prevalent notions of population growth and sexual morality, and of particular concern for the health of women based on then current surgical and antiseptic standards.⁵ The severe limitations upon abortion practices codified in such state legislation did not represent either the long-standing common law view which treated termination of a pregnancy as a crime only after quickening,⁶ nor did it agree with basic historical concepts. Abortion was available to some degree in civilizations of Greece and Rome and throughout Western civilization and was not considered criminal or immoral before quickening.⁷

Representatives of virtually every segment of our society (except for those minority religious groups whose doctrines prohibit it) have now publicly proclaimed that a woman has the constitutional right to determine whether or not to

⁵ Lader, *Abortion* 89-90 (1966).

⁶ *Hunter v. Wheate*, 53 App. D.C. 206, 289 F. 604 (1923); *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915 (1969); and see opinion below, 305 F.Supp. at 1034.

⁷ For summaries of the history of abortion in Western and Anglo-Saxon law, see Commentary on Draft No. 9 of the Model Penal Code, p. 148 n. 12; Williams, "The Law of Abortion," 2 Current Legal Problems 128 (1949); and R. Hahnel, "The Artificial Abortion in Antiquity," 29 *Arch Geschicht Med* 224, summarized in Geigersham, *Annotated Bibliography of Induced Abortion* (1969).

carry a pregnancy to term, and that a doctor has the constitutional right to provide her with complete medical advice and services free of restraint from criminal laws which are not founded upon a compelling and countervailing state interest. The failure of society and of the law to recognize the existence of these non-enumerated rights until recent years does not impair their constitutionally protected status nor preclude this Court from recognizing them. As the Court said in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669:

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" . . . Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

The significance to this Court of the wide national concern over the availability of abortions should be its indication that the time has come for an authoritative resolution of the constitutional questions presented by this case.

B. Anti-Abortion Laws Have Created a Significant Health Problem

The current interest in this issue is certainly justified. The extent of human injury and suffering caused by anti-abortion laws is profound.⁸ A conservative estimate of the number of illegal abortions in the United States each year is one million.⁹ Other estimates vary as high as one and a half times that figure, although by the nature of the prob-

⁸See Geiger, *Annotated Bibliography of Induced Abortion* (1969).

⁹A. Rossi, *Public Views on Abortion*, in Guttmacher, *The Case for Legalized Abortion Now* 27 (1967); Lader, *Abortion* 2-3 (1966).

lem no fully reliable estimate can be made.¹⁰ Contrary to one of the current popular social myths, it is not the promiscuous teenager or college girl who most frequently seeks an abortion; by far the majority of women involved are married women who, because of economic circumstances, difficulties with their marriage or children, or for similar reasons, feel that they do not want another child at the time of the pregnancy.¹¹

Criminal abortions are the largest single cause of so-called maternal mortality in the United States.¹² The incidence of criminal abortion represents a public health problem of a magnitude perhaps equalled only by cancer and heart disease.¹³

By forcing great numbers of women to turn to criminal abortionists, anti-abortion laws have created this severe public health problem. Investigators have estimated that five thousand women in the United States die each year from criminal abortions, and that illegal abortions induced by persons without medical training result in a death rate of one per ten abortions. This rate compares with the rate of three deaths per 100,000 abortions for legal abortions performed in hospitals by qualified medical practitioners.¹⁴

¹⁰ Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion*, 46 N. Caro. L. Rev. 730 (1968).

¹¹ Lader, *Abortion* 58-59 (1966); G. Hardin, "Abortion and Human Dignity," in Guttmacher, *The Case for Legalized Abortion Now* 71 (1967).

¹² Niswander, "Medical Abortion Practices in the United States," 17 *West. Res. L. Rev.* 403 (1965).

¹³ Gold, Erhardt, Jacogziner & Nelson, "Therapeutic Abortions in New York City: A 20-year Review," 55 *Am. J. of Pub. Health* 964, 970-971 (1965).

¹⁴ Bates & Zawadski, *Criminal Abortion*, 3-4 (1964); C. Tietze, "Mortality with Contraception and Induced Abortion," 45 *Studies in Family Planning* 6-8 (1969).

The incidence of severe infection from criminal abortion is, as would be expected, much greater than the incidence of death.¹⁵

The brunt of this health problem has fallen upon the poor. As the Task Force on Administration of Justice of the President's Commission on Law Enforcement and Administration recently stated, "[I]t is primarily the uneducated and poor who must resort to hole-in-the-wall abortions."¹⁶

CONCLUSION

At issue here are novel questions that directly affect substantial and basic rights of life and liberty. The rights asserted by the Appellee are too basic, and the questions presented too urgent, to be ignored or avoided, even for a short period of time. For the reasons described above, the

¹⁵See Stevenson & Yang, "Septic Abortion with Shock," 83 *Am. J. Obst. & Gynec.* 1229 (1962).

¹⁶Task Force [on Administration of Justice] Report: The Courts 105 (1967). The Report also noted that:

Abortion laws are another instance in which the criminal law, by its failure to define prohibited conduct carefully, has created high costs for society and has placed obstacles in the path of effective enforcement These factors produce the spectacle of pervasive violations but few prosecutions.

* * *

The present state of the law presents particularly acute problems for conscientious parents and physicians faced with weighty reasons for terminating pregnancy in a jurisdiction where the law is restrictive or its standards are vague and uncertain. Since some highly reputable physicians regard the law as an injustice and want to protect their patients against incompetent abortions available on the black market, large numbers of reputable citizens find themselves in the position of law violators. This tends to contribute to antagonism and resentment toward those who enforce the law *Id.*

ACLU respectfully urges this Court to accept jurisdiction in this case and to consider the merits of the constitutional issues presented.

Respectfully submitted

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